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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 LAYER2 COMMUNICATIONS, INC.,

12 Plaintiff,

13 v.

14 FLEXERA SOFTWARE, LLC,

15 Defendant.
16

17 AND RELATED COUNTER-CLAIM
18

Case No. Case No. 4:13 cv 02131 DMR

**(AMENDED) STIPULATED PROTECTIVE
ORDER**

Action Filed: May 8, 2013

19 **1. PURPOSES AND LIMITATIONS**

20 Disclosure and discovery activity in this action are likely to involve production of
21 confidential, proprietary, or private information for which special protection from public
22 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.
23 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
24 Protective Order. The parties acknowledge that this Order does not confer blanket protections on
25 all disclosures or responses to discovery and that the protection it affords from public disclosure
26 and use extends only to the limited information or items that are entitled to confidential treatment
27 under the applicable legal principles. The parties further acknowledge, as set forth in Section
28 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential

1 information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that
2 must be followed and the standards that will be applied when a party seeks permission from the
3 court to file material under seal.

4 **2. DEFINITIONS**

5 **2.1 Challenging Party:** a Party or Non-Party that challenges the designation of
6 information or items under this Order.

7 **2.2 "CONFIDENTIAL" Information or Items:** information (regardless of how it is
8 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
9 of Civil Procedure 26(c).

10 **2.3 Counsel (without qualifier):** Outside Counsel of Record and House Counsel (as
11 well as their support staff).

12 **2.4 Designating Party:** a Party or Non-Party that designates information or items that it
13 produces in disclosures or in responses to discovery as "CONFIDENTIAL" or "HIGHLY
14 CONFIDENTIAL – ATTORNEYS' EYES ONLY".

15 **2.5 Disclosure or Discovery Material:** all items or information, regardless of the
16 medium or manner in which it is generated, stored, or maintained (including, among other things,
17 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
18 responses to discovery in this matter.

19 **2.6 Expert:** a person with specialized knowledge or experience in a matter pertinent to
20 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or
21 as a consultant in this action, (2) is not a past or current employee of a Party or of a Party's
22 competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party
23 or of a Party's competitor.

24 **2.7 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or**
25 **Items:** extremely sensitive "Confidential Information or Items," disclosure of which to another
26 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by
27 less restrictive means.

28 **2.8 House Counsel:** attorneys who are employees of a party to this action. House

Counsel does not include Outside Counsel of Record or any other outside counsel.

2.9 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.10 Outside Counsel of Record: attorneys who are not employees of a party to this action but are retained to represent or advise a party to this action and have appeared in this action on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

2.11 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

2.12 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.14 Protected Material: any Disclosure or Discovery Material that is designated as "CONFIDENTIAL," or as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Stipulation and Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including those who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use

1 of becoming part of the public record through trial or otherwise; and (b) any information known
2 to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the
3 disclosure from a source Protected Material at trial shall be governed by a separate agreement or
4 order.

5 **4. DURATION**

6 Even after final disposition of this litigation, the confidentiality obligations imposed by
7 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
8 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
9 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after
10 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
11 including the time limits for filing any motions or applications for extension of time pursuant to
12 applicable law.

13 **5. DESIGNATING PROTECTED MATERIAL**

14 **5.1 Exercise of Restraint and Care in Designating Material for Protection.** Each Party
15 or Non-Party that designates information or items for protection under this Order must take care
16 to limit any such designation to specific material that qualifies under the appropriate standards.
17 To the extent it is practical to do so, the Designating Party must designate for protection only
18 those parts of material, documents, items, or oral or written communications that qualify – so that
19 other portions of the material, documents, items, or communications for which protection is not
20 warranted are not swept unjustifiably within the ambit of this Order.

21 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
22 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
23 unnecessarily encumber or retard the case development process or to impose unnecessary
24 expenses and burdens on other parties) expose the Designating Party to sanctions.

25 If it comes to a Designating Party's attention that information or items that it designated
26 for protection do not qualify for protection at all or do not qualify for the level of protection
27 initially asserted, that Designating Party must promptly notify all other parties that it is
28 withdrawing the mistaken designation.

1 **5.2 Manner and Timing of Designations.** Except as otherwise provided in this Order
 2 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
 3 Disclosure or Discovery

4 Material that qualifies for protection under this Order must be clearly so designated before
 5 the material is disclosed or produced.

6 Designation in conformity with this Order requires:

7 (a) for information in documentary form (e.g., paper or electronic documents, but
 8 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
 9 Party affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
 10 EYES ONLY” to each page that contains protected material. If only a portion or portions of the
 11 material on a page qualifies for protection, the Producing Party also must clearly identify the
 12 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for
 13 each portion, the level of protection being asserted.

14 A Party or Non-Party that makes original documents or materials available for inspection
 15 need not designate them for protection until after the inspecting Party has indicated which
 16 material it would like copied and produced. During the inspection and before the designation, all
 17 of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
 18 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants
 19 copied and produced, the Producing Party must determine which documents, or portions thereof,
 20 qualify for protection under this Order. Then, before producing the specified documents, the
 21 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY
 22 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) to each page that contains Protected Material.
 23 If only a portion or portions of the material on a page qualifies for protection, the Producing Party
 24 also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the
 25 margins) and must specify, for each portion, the level of protection being asserted.

26 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
 27 Designating Party identify on the record, before the close of the deposition, hearing, or other
 28 proceeding, all protected testimony and specify the level of protection being asserted. When it is

impractical to identify separately each portion of testimony that is entitled to protection and it appears that substantial portions of the testimony may qualify for protection, the Designating Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded) a right to have up to 21 days to identify the specific portions of the testimony as to which protection is sought and to specify the level of protection being asserted. Only those portions of the testimony that are appropriately designated for protection within the 21 days shall be covered by the provisions of this Stipulated Protective Order. Alternatively, a Designating Party may specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

Parties shall give the other parties notice if they reasonably expect a deposition, hearing or other proceeding to include Protected Material so that the other parties can ensure that only authorized individuals who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

Transcripts containing Protected Material shall have an obvious legend on the title page that the transcript contains Protected Material, and the title page shall be followed by a list of all pages (including line numbers as appropriate) that have been designated as Protected Material and the level of protection being asserted by the Designating Party. The Designating Party shall inform the court reporter of these requirements. Any transcript that is prepared before the expiration of a 21-day period for designation shall be treated during that period as if it had been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as actually designated.

(c) for information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL” or

1 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”. If only a portion or portions of
 2 the information or item warrant protection, the Producing Party, to the extent practicable, shall
 3 identify the protected portion(s) and specify the level of protection being asserted.

4 **5.3 Inadvertent Failures to Designate.** If timely corrected, an inadvertent failure to
 5 designate qualified information or items does not, standing alone, waive the Designating Party’s
 6 right to secure protection under this Order for such material. Upon timely correction of a
 7 designation, the Receiving Party must make reasonable efforts to assure that the material is
 8 treated in accordance with the provisions of this Order.

9 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

10 **6.1 Timing of Challenges.** Any Party or Non-Party may challenge a designation of
 11 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality
 12 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
 13 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to
 14 challenge a confidentiality designation by electing not to mount a challenge promptly after the
 15 original designation is disclosed.

16 **6.2 Meet and Confer.** The Challenging Party shall initiate the dispute resolution
 17 process by providing written notice of each designation it is challenging and describing the basis
 18 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written
 19 notice must recite that the challenge to confidentiality is being made in accordance with this
 20 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in
 21 good faith and must begin the process by conferring directly (in voice to voice dialogue; other
 22 forms of communication are not sufficient) within 14 days of the date of service of notice. In
 23 conferring, the Challenging Party must explain the basis for its belief that the confidentiality
 24 designation was not proper and must give the Designating Party an opportunity to review the
 25 designated material, to reconsider the circumstances, and, if no change in designation is offered,
 26 to explain the basis for the chosen designation. A Challenging Party may proceed to the next
 27 stage of the challenge process only if it has engaged in this meet and confer process first or
 28 establishes that the Designating Party is unwilling to participate in the meet and confer process in

1 a timely manner.

2 **6.3 Judicial Intervention** [pursuant to Standing Order for Magistrate Judge Donna M.
3 Ryu, revised 7/3/12]. If disagreements as to confidentiality designations cannot be resolved
4 without judicial intervention, the parties shall file a joint letter with the court later than five
5 business days after the meet and confer session, unless otherwise directed by the court. **Lead**
6 **trial counsel for both parties must sign the letter**, which shall include an attestation that the
7 parties met and conferred in person or by telephone regarding all issues prior to filing the letter.
8 Going issue-by-issue, the joint letter shall describe each unresolved issue, summarize each party's
9 position with appropriate legal authority; and provide each party's final proposed compromise
10 before moving to the next issue. The joint letter shall not exceed 10 pages without leave of court.
11 **Parties are expected to plan for and cooperate in preparing the joint letter so that each side**
12 **has adequate time to address the arguments.** In the rare instance that a joint letter is not
13 possible, each side may submit a letter not to exceed four pages, which shall include an
14 explanation of why joint letter was not possible. The parties shall submit one exhibit to the letter
15 that only sets forth each disputed discovery request in full, followed immediately by the
16 objections and/or responses thereto. No other information shall be included in any such exhibit.
17 No other exhibit shall be submitted without prior approval by the court. The court will review the
18 submissions and determine whether formal briefing or proceedings are necessary. **Discovery**
19 **letter briefs must be filed under the civil events category of Motions and Related Filings >**
20 **Motions – General > “Discovery Letter Brief”.**

21 In addition, pursuant to Civil L.R. 5-1(d)(7) and 5-2(b), parties must lodge an extra paper
22 copy of certain filings and mark it as a copy for “Chambers.” The chambers copy must be three
23 or punched and submitted to the Oakland clerk's office.

24 In the event that a discovery hearing is ordered, the court is found that it is often efficient
25 and beneficial for counsel to appear in person. This provides the opportunity, where appropriate,
26 to engage counsel in resolving aspects of the discovery dispute while remaining available to rule
27 on any dispute that counsel are not able to resolve. For this reason, the court expects counsel to
28 appear in person. Permission for a party to attend by telephone may be granted, in the court's

discretion, upon written request made at least one week in advance of the hearing if the court determines that good cause exists to excuse personal attendance and that personal attendance is not needed in order to have an effective discovery hearing. Facts establishing good cause must be set forth in the request.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 15 below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner¹ that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

¹ It may be appropriate under certain circumstances to require the Receiving Party to store any electronic Protected Material in password-protected form.

(d) the court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), **unless otherwise agreed by the Designating Party or ordered by the court.** Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A;

(b) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been followed;

(c) the court and its personnel;

(d) court reporters and their staff, professional jury or trial consultants, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A); and

(e) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items to Experts.

(a) Unless otherwise ordered by the court or agreed to in writing by the Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to paragraph 7.3(c) first must make a written request to the Designating Party that (1) identifies the general categories of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information that the Receiving Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and the city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5) identifies each person or entity from whom the Expert has received compensation or funding for work in his or her areas of expertise or to whom the expert has provided professional services, including in connection with a litigation, at any time during the preceding five years,² and (6) identifies (by name and number of the case, filing date, and location of court) any litigation in connection with which the Expert has offered expert testimony, including through a declaration, report, or testimony at a deposition or trial, during the preceding five years.³

(b) A Party that makes a request and provides the information specified in the preceding respective paragraphs may disclose the subject Protected Material to the identified Expert unless, within 14 days of delivering the request, the Party receives a written objection from the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

(c) A Party that receives a timely written objection must meet and confer with the

² If the Expert believes any of this information is subject to a confidentiality obligation to a third-party, then the Expert should provide whatever information the Expert believes can be disclosed without violating any confidentiality agreements, and the Party seeking to disclose to the Expert shall be available to meet and confer with the Designating Party regarding any such engagement.

³ It may be appropriate in certain circumstances to restrict the Expert from undertaking certain limited work prior to the termination of the litigation that could foreseeably result in an improper use of the Designating Party’s “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information.

Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement within seven days of the written objection. If no agreement is reached, the Party seeking to make the disclosure to the Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5 and General Order 62, if applicable) seeking permission from the court to do so. Any such motion must describe the circumstances with specificity, set forth in detail the reasons why the disclosure to the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and suggest any additional means that could be used to reduce that risk. In addition, any such motion must be accompanied by a competent declaration describing the parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and setting forth the reasons advanced by the Designating Party for its refusal to approve the disclosure.

In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden of proving that the risk of harm that the disclosure would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" that Party must:

- (a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;
- (b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and
- (c) cooperate with respect to all reasonable procedures sought to be pursued by the

Designating Party whose Protected Material may be affected.⁴

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

**9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
PRODUCED IN THIS LITIGATION**

(a) The terms of this Order are applicable to information produced by a Non-Party in this action and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”. Such information produced by Non-Parties in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party’s confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;
2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and
3. make the information requested available for inspection by the Non-Party.

⁴ The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued.

(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return or destroy the specified information and any copies it has and may not sequester, use or disclose the information until the claim is resolved. This includes a restriction against presenting the information to the court for a determination of the claim. This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the

1 parties reach an agreement on the effect of disclosure of a communication or information covered
2 by the attorney-client privilege or work product protection, the parties may incorporate their
3 agreement in the stipulated protective order submitted to the court.

4 **12. MISCELLANEOUS**

5 **12.1 Right to Further Relief.** Nothing in this Order abridges the right of any person to
6 seek its modification by the court in the future.

7 **12.2 Right to Assert Other Objections.** By stipulating to the entry of this Protective
8 Order no Party waives any right it otherwise would have to object to disclosing or producing any
9 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no
10 Party waives any right to object on any ground to use in evidence of any of the material covered
11 by this Protective Order.

12 **12.3 Filing Protected Material.** Without written permission from the Designating Party
13 or a court order secured after appropriate notice to all interested persons, a Party may not file in
14 the public record in this action any Protected Material. A Party that seeks to file under seal any
15 Protected Material must comply with Civil Local Rule 79-5 and General Order 62. Protected
16 Material may only be filed under seal pursuant to a court order authorizing the sealing of the
17 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 and General Order 62, a
18 sealing order will issue only upon a request establishing that the Protected Material at issue is
19 privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a
20 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-
21 5(d) and General Order 62 is denied by the court, then the Receiving Party may file the Protected
22 Material in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by
23 the court.

24 **13. FINAL DISPOSITION**

25 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
26 Receiving Party must return all Protected Material to the Producing Party or destroy such
27 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
28 compilations, summaries, and any other format reproducing or capturing any of the Protected

Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60-day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated: September 6, 2013

ARCHER NORRIS

/s/ Chad D. Greeson

Chad D. Greeson
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LAYER2 COMMUNICATIONS, INC

Dated: September 6, 2013

BARNES & THORNBURG

/s/ David W. Nelson

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Los Angeles, CA 90067

Attorneys for Defendant/Counter-Claimant
FLEXERA SOFTWARE, LLC.

IT IS ORDERED that the forgoing Agreement is approved.

Dated: September 10, 2013



UNITED STATES DISTRICT/MAGISTRATE JUDGE